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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. PRISCILLA McMICHAEL, Defendant and Appellant.	B266716 (Los Angeles County Super. Ct. No. NA101492)

APPEAL from a judgment of the Superior Court of Los Angeles County. James D. Otto, Judge. Affirmed.

Stephanie L. Gunther, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Priscilla McMichael of robbery. (Pen. Code, § 211.)[1] The trial court suspended imposition of sentence and placed McMichael on probation. McMichael asserts claims of instructional error and ineffective assistance of counsel. We affirm the judgment.

FACTS

Background

On March 25, 2015, Michael Angeles and Alex Vargas were working as loss prevention officers at a grocery store in Long Beach when McMichael and Juan Islas entered the store.[2] As Angeles watched McMichael, he saw her put several items into her purse, including shampoo and lotion bottles. As Vargas watched Islas, he saw him take a three-pack of beer from one aisle and walk several aisles over to where McMichael was standing. Angeles and Vargas then watched as Islas approached McMichael and handed her the beer, which she placed in her purse with the other items. When Islas and McMichael exited the store without paying, Angeles and Vargas followed them outside.

Angeles and Vargas approached McMichael and Islas in the parking lot, identified themselves as loss prevention officers, and displayed their badges. They asked Islas and McMichael to return to the store. When McMichael and Islas tried to walk

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[1] All further undesignated section references are to the Penal Code.

[2] Islas was jointly charged with robbery along with McMichael. The charges were tried together to the same jury. The jury also convicted Islas. He filed a separate appeal. We affirmed the judgment against Islas. (*People v. Islas* (Oct. 5, 2016, B267993) [nonpub. opn.].)

away, Vargas stepped in front of McMichael to prevent her from leaving. McMichael began screaming at Vargas, as Islas began walking toward a nearby alleyway.

McMichael "started swinging her purse at [Vargas]." After Vargas grabbed hold of the purse, McMichael said that Vargas could have the merchandise back, and started throwing items from her purse in his direction. A bottle of lotion hit Vargas in the chest and exploded on him. When Vargas grabbed McMichael's purse, Islas returned. Islas made a fist with his right hand as he grabbed Vargas on the forearm. At that point, Angeles warned Islas that the situation would escalate to a robbery if he hit him or Vargas. Islas then let go of Vargas's arm, and both Islas and McMichael fled the scene.[3]

Angeles and Vargas called 911 as they followed McMichael and Islas. McMichael tripped and fell, but Islas continued running and got on a Metro train. Angeles and Vargas detained McMichael. Shortly thereafter, Long Beach Police Department Officer Timothy Redshaw arrived, handcuffed McMichael, and searched her purse. He found a can of beer in her bag, but did not note this on his police report.

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[3] The facts summarized here are largely taken from Angeles's testimony. Vargas's testimony was similar, but varied slightly. Vargas testified that he grabbed McMichael's purse as she attempted to leave the parking lot, and that there was a "tug-of-war" over the purse. Islas then ran back, grabbed Vargas's hand, and raised his fist in the air at Vargas. Vargas told Islas that, if he hit him or Angeles, the situation would be considered a robbery, and which point Islas put down his hands. When Vargas released McMichael's purse, she began throwing items at Vargas as she and Islas fled down an alleyway.

A radio dispatch was broadcast advising that a robbery suspect was on board the Metro train. Long Beach Police Department Officer Edmund Moscoso responded, located the train, and detained Islas and two other individuals. Angeles and Vargas identified Islas as the robbery suspect in a field show up.

The Criminal Proceedings

In April 2015, the People filed an information jointly charging Islas and Michael with second degree robbery. (§ 211). The charges were tried to a jury during August 2015, at which time the prosecution presented evidence establishing the facts summarized above. McMichael did not present any defense evidence. The trial court instructed the jury on the charge of robbery, including aiding and abetting liability for robbery, and on petty theft as a lesser included offense of robbery.

On August 18, 2015, the jury returned a verdict finding McMichael guilty of robbery as charged.

The trial court thereafter suspended imposition of sentence and placed McMichael on formal probation for a period of three years on various terms and conditions, including that she serve 288 days in county jail, with credit for 288 days. Further, the court ordered McMichael to pay a variety of ordinary fines and fees not questioned on appeal.

McMichael filed a timely appeal.

DISCUSSION

I. The Trial Court Did Not Need to Define the Words "Truly Abandoned"

McMichael contends her robbery conviction must be reversed because the trial court did not sua sponte define the term "truly abandoned" as it was used in one of the jury instructions. We disagree.

The Trial Setting

During a jury instruction conference, McMichael requested a pinpoint instruction on the use of force or fear during an alleged robbery, specifically, an instruction to the effect that, where there is evidence showing the defendant did not use force or fear until after he or she had abandoned the victim's stolen property, there was no robbery.[4] Pursuant to this request, the trial court instructed the jury as follows: "If a defendant truly abandoned the victim's property before using force, then, of course he or she could be guilty of theft, but not of robbery."

Analysis

McMichael argues the trial court had a sua sponte duty to clarify her proffered instruction by defining the term "truly abandoned." We reject this instructional error claim for several reasons.

First, McMichael forfeited her claim of instructional error on appeal by failing in the trial court to request the further modification or clarification that she now implores on appeal should have been given. It is well-settled that a defendant may not complain on appeal that an instruction correct in law and responsive to the evidence was too general unless he or she requested appropriate clarifying or amplifying language in the trial court. (See, e.g., *People v. Palmer* (2005) 133 Cal.App.4th

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[4] McMichael relied on *People v. Hodges* (2013) 213 Cal.App.4th 531 (*Hodges*). In *Hodges*, the Court of Appeal reversed the defendant's robbery conviction on finding that the trial court should have given an instruction, in response to a jury question during its deliberations, explaining that if they found the defendant did not use force until after he had truly abandoned the victim's stolen property, then the defendant did not commit a robbery, but only a theft. (*Id.* at pp. 539-544.)

1141, 1156.) Because her proffered instruction did not misstate the law, the onus was on McMichael to request further explanation. Because she failed to do so, her claim is forfeited. (*Ibid*.)

Second, assuming McMichael's claim of instructional error is not forfeited, it fails on the merits in any event. A trial court has a duty sua sponte to instruct on the general principles of law relevant to the issues raised by the evidence in the case, which includes giving an explanatory instruction when a term in an instruction has a technical meaning peculiar to the law. (*People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318 (*Ryan*); *People v. Jimenez* (1995) 33 Cal.App.4th 54, 61-62.) On the observe side of the coin, commonly understood terms need not be specially defined for the jury. (*People v. Forbes* (1996) 42 Cal.App.4th 599, 604.) The test is whether a term or phrase has a technical meaning peculiar to the law. (*Id*. at p. 605.) Here, the meaning of "truly abandoned property" is not peculiar to the law nor is it beyond the everyday comprehension of jurors. To abandon property means to "cease to assert or exercise an interest" to the property, "esp[ecially] with the intent of never again resuming or reasserting it." (Webster's 3d New Internat. Dict. (1981) p. 2.) In common parlance, it basically means to discard property, for good. This common sense interpretation was applicable at McMichael's trial. The trial court was not required to define the concept of truly abandoned property further. Interestingly, McMichael has not proffered to us an example of what a proper definition of "truly abandoned property" would or should look like.

McMichael's reliance on *Ryan, supra,* 76 Cal.App.4th at pages 1317-1320, *In re George G.* (1977) 68 Cal.App.3d 146, 159-162 (*George G.*), and *Martin v. Cassidy* (1957) 149 Cal.App.2d 106, 110 (*Martin*), for a contrary conclusion is not persuasive. In *Ryan*, the defendant was convicted of child abduction under section 278. On appeal, he argued the evidence did not establish his lack of the right to custody of the child as necessary for a section 278 conviction. In this context, he argued the trial court failed to define sua sponte the term "abandoned" as used in former section 279. Under former 279, the defendant could be found to have a right to custody in the event the child was abandoned at the time of the taking.[5] The Court of Appeal agreed that an instruction explaining when and under what circumstances a child is "abandoned" should have been given to the jury because an abandoned child has a special legal meaning under the Penal and Family Codes. The *Ryan* case is not helpful to McMichael. A jury having to decide the issue of whether and when a child has been abandoned by a parent for purposes of a charge of child abduction against another parent has no analogous application to a jury having to decide when an item of personal property has been abandoned by its immediate possessor.

George G. involved a proceeding brought by a county department of adoptions to terminate parental rights based on an alleged voluntary abandonment of children. *George G.* does not

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[5] The relevant language of former section 279 apparently read: "(f) . . . (2) A 'right of custody' means the right to physical custody. In the absence of a court order to the contrary, a parent loses his or her right to custody of the child to the other parent if the parent having the right of custody . . . has abandoned his or her family."

involve any issue concerning when and under what circumstances a trial court must define terms in a jury instruction; the case involved whether the evidence was sufficient to satisfy the statutory definition of abandonment under the former Civil Code sections governing child welfare cases. Again, we find this case unhelpful, as the matter of an abandoned child is not analogous to the abandonment of personal property.

In *Martin*, the issue was whether the evidence was sufficient to support the court's finding that a lessee had abandoned and surrendered the leased property. (*Martin, supra*, 149 Cal.App.2d at p. 110.) In this context, the Court of Appeal defined the meaning of the abandonment of leased property, including the element of intention to relinquish the control over the leased property. (*Id*. at p. 111.) The *Martin* case does not involve any issue concerning when and under what circumstances a trial court is required to define terms in a jury instruction, as it was a court, and not jury, trial. Further, the matter of abandoning leased real property is not analogous to the abandonment of personal property.

Finally, assuming the trial court erred in not defining the concept of abandoning the victim's stolen property, any error was harmless. Here, even had the jury been instructed with some definition of the term "truly abandoned property," we are confident the outcome would not have been different. The court properly instructed the jury on the elements of the crime of robbery, and petty theft, and gave McMichael's pin point instruction on abandonment before the use of force as a defense to robbery. The evidence showed that McMichael committed a robbery because she used force before starting to throw any items away. The testimony from the two loss prevention officers was

consistent that McMichael wielded her purse with force before starting to throw any items away. Further, the jury could reasonable have viewed the throwing of the items as force intended to facilitate a get away with the remaining property. McMichael's statements to the effect, "You can have your merchandise back" was not binding on the jury to find she intended to abandon the property. In summary, the jury's guilty verdict is supported by very strong evidence. In contrast, the idea that McMichael abandoned the stolen merchandise before she began to use force was weak, if present at all.

II. Counsel Was Not Ineffective for Failing to Request Instruction on "Truly Abandoned Property"

Taking a different route to the same desired end, McMichael contends her robbery conviction must be reversed because her trial counsel provided ineffective representation by not asking for a clarifying instruction on the meaning of the term "truly abandoned property." We disagree.

A claim of ineffective assistance of counsel involves two components. First, the defendant must demonstrate that his or her counsel's performance was deficient under a standard of objective reasonableness. Second, the defendant must demonstrate that the outcome of his or her case would have been more favorable without the error. (See, e.g., *People v. Garrison* (1989) 47 Cal.3d 746, 786, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668.)

McMichael's ineffective assistance of counsel claim fails on both components for the reasons explained in section I of this opinion. First, the trial court was not required to instruct on the meaning of the common day term "truly abandoned property." Thus, there was no below standard performance by McMichael's

trial attorney in not requesting that such a clarifying instruction be given. (See, e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 587 [the law of ineffective assistance of counsel does not require idle acts].) Second, we see nothing in the record to persuade us that the result of McMichael's trial would have been different had only the trial court given a clarifying instruction at the behest of her trial counsel.

III. Counsel Was Not Ineffective for Failing to Request Instruction on Mistake of Fact

McMichael next contends her trial counsel provided ineffective assistance of counsel by failing to request an instruction on the defense of mistake of fact. We disagree.

Appellant's Claim

McMichael argues that an instruction should have been given to the jury along the following lines:

> "If you find that the defendant believed that she returned all the stolen property [before she used any force] and if you find that belief was reasonable, [then] she did not have the specific intent or mental state required for robbery.
>
> "If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for robbery, you must find her not guilty of that crime."

McMichael argues that such an instruction would have supported the argument that her trial counsel made to the jury that McMichael thought she had thrown away all the stolen property before she used force.

Analysis

Section 211 reads: "Robbery is the felonious taking of personal property in the possession of another, from his [or her] person or immediate presence, and against his [or her] will, accomplished by means of force or fear." When a defendant truly abandons a victim's stolen property before using force or fear, the defendant may be found guilty of theft, but not of robbery. (*Hodges, supra*, 213 Cal.App.4th at pp. 539-544.)

The defense of mistake of fact may be applied when a defendant has "an actual belief 'in the existence of circumstances, which, if true, would make the act with which the person is charged an innocent act . . . .' [Citations.]" (*People v. Lawson* (2013) 215 Cal.App.4th 108, 115.)

McMichael argues the mistake of fact defense is available when the evidence would support a jury's finding that a defendant actually believed that he or she truly abandoned a victim's stolen property before the use of force. No case proffered by the parties provides guidance to this court on whether such a defense exists in these circumstances. For purposes of this appeal, we will assume without deciding that she had a right to the instruction and that her trial court acted deficiently in not requesting it.

This leaves the issue of whether McMichael has shown prejudice from her counsel's deficient legal performance. Here, we find that McMichael has not shown prejudice. As we discussed above, we see the evidence as overwhelmingly showing that McMichael used force *before* she started to abandon any of the grocery's stolen property. There was no contradictory evidence. The jury's finding of guilt on the charged robbery over petty theft shows the jury rejected a scenario that McMichael's

use of force was not connected to the theft of the grocery's property. The evidence further showed, without any dispute, that McMichael attempted to flee, showing a consciousness of guilt. We are confident that the jury, instructed on the mistake of fact defense, still would have returned its verdict finding her guilty of robbery.

IV. The Trial Court Was Not Required to Instruct on the Lesser Offense of Grand Theft Person

McMichael contends her robbery conviction must be reversed because the trial court erred by failing to instruct sua sponte "grand theft person" in violation of section 487, subdivision (c), as a lesser included offense of robbery. We disagree.

The Law Governing Instructions on Lesser Included Offenses

A trial court has a sua sponte duty to instruct on a lesser offense necessarily included in a charged offense when there is substantial evidence the defendant is guilty only of the lesser offense. (*People v. Shockley* (2013) 58 Cal.4th 400, 403-404.) This duty exists whether or not the defense requests instructions on a lesser included offense, and even over a defense objection. (*People v. Breverman* (1998) 19 Cal.4th 142, 153; *People v. Barton* (1995) 12 Cal.4th 186, 195.) Substantial evidence in this context means evidence from which a reasonable jury could conclude that the defendant committed the lesser, but not the greater, offense. (*People v. Ochoa* (1998) 19 Cal.4th 353, 422.) The corollary rule is that a trial court is not required to "instruct sua sponte on the panoply of all possible lesser included offenses," but only when there is substantial evidence in support of a particular lesser included offense. (*People v. Huggins* (2006) 38 Cal.4th 175, 215.)

An appellate court applies the independent or de novo standard of review to a claimed failure by a trial court to instruct on an uncharged offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

The Law Governing Robbery and Lesser Included Offenses

Theft is a lesser included offense of robbery, with the greater offense including the additional element of force or fear. (*People v. Williams* (2013) 57 Cal.4th 776, 786-787; *People v. Whalen* (2013) 56 Cal.4th 1, 69.) A theft "from the person of another" is defined as a grand theft. (§ 487, subd. (c).) "From the person of another" means that the item taken was actually on the body, or held by, or in some manner attached to, the victim. (*People v. McElroy* (1897) 116 Cal. 583, 586.) Speaking in more common parlance, the grand theft person statue is basically an anti-pick-pocketing or anti-purse snatching statute. (*Ibid.*) Thus, grand theft person, depending upon the facts of a case, may possibly be a lesser included offense of a robbery charge. (*People v. Ortega* (1998) 19 Cal.4th 686, 699.)

Analysis

Based on the evidence presented, McMichael could only be convicted of robbery or petty theft. There is no evidence at all to support a jury finding that the property taken from the grocery store was "on or held by or in some manner attached to the person of another" at the time it was taken as contemplated by section 487, subdivision (c). Here, the crime was not taken from a person, but from a store. (*People v. McElroy, supra*, 116 Cal. at p. 586.) McMichael either did or did not use force against the loss prevention officers in asporting the grocery's stolen property away from the premises. She did not try to take the property "from the person of another" when she took possession of the grocery's property off the shelf.

V. The Trial Court Was Not Required to Instruct on the Lesser Offense of Attempted Robbery

McMichael contends her robbery conviction must be reversed because the trial counsel erred by failing to instruct on the lesser included offense of attempted robbery. We disagree.

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) "To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force." (*People v. Marshall* (1997) 15 Cal.4th 1, 34) If the intent to steal arose after the use of force against the victim is completed, the pre-force taking constitutes only a theft. (*Ibid.*) A robbery begins at the time of the original taking and continues until the robber reaches a place of relative safety. (*People v. Estes* (1983) 147 Cal.App.3d 23, 28.) Thus, a simple theft becomes robbery if force or fear is used during asportation, even though the original taking is accomplished without force or fear. (*Ibid.*) In contrast to all of these rules, the lesser included offense of attempted robbery requires proof of the defendant's specific intent to commit a robbery, coupled with his or her "direct, ineffectual act (beyond mere preparation) toward its commission." (*People v. Medina* (2007) 41 Cal.4th 685, 694 (*Medina*).)

McMichael argues that "it would not be unreasonable for the jury to believe that [she] intended to rob the grocery store, but, when confronted by the loss prevention officer changed her mind and returned the stolen property and that [she] was later under the impression that she had returned all the property when she kicked [the loss prevention officer]."

The problem with McMichael's argument is that if the jury found as she argues, it would necessarily have to have found that the crime was not a robbery or attempted robbery, but only a theft. This is the necessary result because the jury would have had to find that McMichael's use of force did not occur until *after she no longer had the intent to steal*, the intent required to commit a robbery. The factual scenario posited by McMichael does not describe an attempt to commit a robbery that went unaccomplished, but a theft. McMichael's argument involves only the issue of the timing of the use of force, relevant for the crimes of robbery versus theft, but not for the crime of an attempted robbery.

The proper focus for the attempted robbery analysis is to determine whether there is evidence in the record to support a finding by the jury that McMichael had the specific intent to commit a robbery at the same time that she engaged in "a *direct, ineffectual act* . . . toward its commission." (*Medina, supra*, 41 Cal.4th at p. 694, italics added.) Thus, the important inquiry is whether the jury could have found that McMichael's conduct amounted to a "direct, ineffectual act" toward the commission of a completed robbery. We find this proposition highly unlikely, but will assume such an instruction was required for purposes of this appeal.

Thus, we turn to the issue of whether the failure to give an attempted robbery instruction may be considered prejudicial. We are confident it cannot. The erroneous failure to instruct on a lesser included offense is harmless, unless the record shows that it was reasonably probable that the defendant would have achieved a more favorable result had the error not occurred. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 149, 178 [holding

that the harmless error standard stated in *People v. Watson* (1956) 46 Cal.2d 818, 837 applies when analyzing prejudice resulting from a trial court's failure to instruct sua sponte on a lesser included offense].) "Such posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration." (*Id*. at p. 177.) As discussed above, there is overwhelming evidence supporting the jury's finding that McMichael used force during her encounter with the loss officers, even before she began to throw away the grocery's property. Further, the evidence strongly supports an inference that the throwing of the property was intended to facilitate escape with the items retained. The facts established by the evidence went far beyond merely an attempt and demonstrated the elements of a completed robbery. We see no reasonable probability that the jury would have found that McMichael committed only the lesser crime of attempted robbery. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177.)

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.